IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARC ARONSON,	:	CIVIL ACTION
Plaintiff	:	
v.	:	
KENNETH S. APFEL, Commissioner of Social Security,	:	
Defendant	:	NO. 97-7375

M E M O R A N D U M

Padova, J. March , 1999

Plaintiff, Marc Aronson, brought this action pursuant to 42 U.S.C.A. § 405(g) (West 1991), seeking judicial review of the final decision of the Commissioner of Social Security ("Commissioner"), denying Plaintiff's claim for Disability Insurance Benefits ("DIB") under Title II of the Social Security Act, 42 U.S.C.A. §§ 401-433. The parties filed cross motions for summary judgment. Pursuant to Local Rule 72.1(d)(1)(C), the Court referred the case to Magistrate Judge Peter B. Scuderi for a Report and Recommendation. The Plaintiff filed timely objections. Because the Court finds that the decision of the Commissioner is not supported by substantial evidence, the Report and Recommendation will not be adopted in part and the matter will be remanded to the Commissioner for further consideration consistent with this Memorandum.

BACKGROUND

Plaintiff, was born on November 25, 1935, is a college graduate and has earned a Master of Arts degree in Mathematics and Computer Science. (Record of Proceedings ("R.") 39, 70, 111). In the past he has worked as an Assistant Professor of Mathematics and Computer Science for various colleges and universities. (R. 39-42, 111). On August 16, 1989, Plaintiff stopped working because of chest pains. (R. 42-43). He filed for DIB on April 26, 1990, alleging a disability that began on August 16, 1989, because of an arrhythmia and chest pain. (R. 70-72, 107-13).

Plaintiff's application for DIB was denied initially and upon reconsideration. (R. 73-79, 89-106). The case has been considered de novo several times by different Administrative Law Judges ("ALJ"s), and has been remanded several times.[1] In the most recent decision by an ALJ, dated March 26, 1996, the ALJ

[1] On December 13, 1991, ALJ Theodore Stephens found that Plaintiff had the residual functional capacity to perform the full range of sedentary work. (R. 21-30). The Appeals Council denied Plaintiff's request for a review. (R. 3-10). On appeal, United States District Judge Jay C. Waldman adopted United States Magistrate Judge Naythons' Report and Recommendation to remand the case for reconsideration of the opinion of treating physician Dr. Peter Heffer, M.D., and for further evaluation of Plaintiff's subjective complaints of chest pain in daily activities. (R. 333-54). On April 29, 1994, on reconsideration, ALJ Leonard E. Ryan agreed with ALJ Stephens that the Plaintiff had the residual functional capacity to perform the full range of sedentary work. (R. 283-89). On April 17, 1995, the Appeals Council remanded the case for a supplemental hearing. (R. 364-65). On March 26, 1996, following the supplemental hearing, ALJ Richard A. Kelly also found that Plaintiff had the residual functional capacity to perform the full range of sedentary work. (R. 261-67). The Appeals Counsel denied Plaintiff's request for a review (R. 243-44).

denied Plaintiff's claims. (R. 261-267)). Specifically, the ALJ found that despite a severe cardiac impairment (a mild cardiomyopathy and medically controlled arrhythmias), Plaintiff had the residual functional capacity for a full range of sedentary work and was able to perform skilled and semi-skilled jobs which exist in significant numbers in the national economy. On October 4, 1997, upon consideration of Plaintiff's exceptions to the ALJ's decision, the Appeals Council denied Plaintiff's request for review. (R. 243-44). The Commissioner adopted the Appeals Council's decision, making it the final decision of the Commissioner. On January 30, 1998, Plaintiff filed this action. Both parties filed motions for summary judgment, and Magistrate Judge Scuderi considered them and issued his Report and Recommendation.

LEGAL STANDARD

Under the Social Security Act, a claimant is disabled if he is unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to . . . last for a continuous period of not less than twelve (12) months." 42 U.S.C.A. § 423(d)(1)(A); 20 C.F.R. § 404.1505 (1981). Under the medical-vocational regulations, as promulgated by the Commissioner, a five-step sequential evaluation is to be used to evaluate

disability claims.[2] The burden to prove the existence of a

[2]The five steps are listed in 20 C.F.R. 404.1520:

> (b) If you are working. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.
>
> (c) You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.
>
> (d) When your impairment(s) meets or equals a listed impairment in Appendix 1. If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.
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> (e) Your impairment(s) must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.
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> (f) Your impairment(s) must prevent you from doing any other work. (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled. (2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see S 404.1562).

20 C.F.R. §§ 404.1520(b)-(f).

disability rests initially upon the claimant. 42 U.S.C. § 423(d)(5). The claimant satisfies this burden by showing an inability to return to his former work. Once the claimant makes this showing, the burden of proof then shifts to the Commissioner to show that the claimant, given his age, education and work experience, has the ability to perform specific jobs that exist in the economy. Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979). Judicial review of the Commissioner's final decision is limited, and this Court is bound by the factual findings of the Commissioner if they are supported by substantial evidence and decided according to correct legal standards. Allen v. Brown, 881 F.2d 37, 39 (3d Cir. 1989); Coria v. Heckler, 750 F.2d 245, 247 (3d Cir. 1984). "Substantial evidence" is deemed to be such relevant evidence as a reasonable mind might accept as adequate to support a decision. Richardson v. Perales, 402 U.S. 389, 407 (1971). It consists of more than a scintilla of evidence but may be somewhat less than a preponderance of the evidence. See Cotter v. Harris, 642 F.2d 700 (3d Cir. 1981).

Despite the deference to administrative decisions implied by this standard, this Court retains the responsibility to scrutinize the entire record and to reverse or remand if the Commissioner's decision is not supported by substantial evidence. Smith v. Califano, 637 F.2d 968, 970 (3d Cir. 1981). Substantial evidence can only be considered as supporting evidence in relationship to all other evidence in the record. Kent v. Schweiker, 701 F.2d 110, 114 (3d Cir. 1983).

In his objections, Plaintiff claims that the ALJ incorrectly applied the Medical Vocational-Guidelines in 20 C.F.R. Part 404, Subpart P, Appendix 2 (“Grids”) and therefore failed to find Plaintiff to be disabled although he meets the requirements for disability under 20 C.F.R. Part 404, Subpart P., Appendix 2, rule 201.06.

DISCUSSION

Under the medical-vocational regulations, the Fifth step in determining whether an individual is disabled provides in pertinent part:

> Your impairment(s) must prevent you from doing any other work. (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

20 C.F.R. § 404.1520(f). To simplify and expedite the determination of disability at step five, the ALJs apply a series of grids, found at 20 C.F.R. Part 404, Subpart P, Appendix 2 ("Grids"), to the specific facts of the cases before them. The Grids are categorized according to whether the individual’s residual functional capacities can sustain sedentary (Table 1), light (Table 2), or medium (Table 3) work.

Rule 201.06 in Table 1, cited by Plaintiff, applies to an individual who is limited to sedentary work as a result of severe medically-determinable impairments. It directs a finding of “disabled” when the individual is age 55 or older, has a high

school graduate education or more which does not provide for direct entry into skilled work and previous work experience that was skilled or semi-skilled, but has no transferable skills. However, Grid Rule 201.07 directs a finding of "not disabled" when that same individual has transferable skills.

Accordingly, this Court must determine whether the ALJ correctly determined that Plaintiff had acquired skills from his previous work experience that were transferable to other sedentary jobs.[3] Skills are transferable when the "skilled or semi-skilled work activities that an individual did in past work can be used to meet the requirements of skilled or semi-skilled work activities of other jobs or kinds of work." 20 C.F.R. § 404.1568(d).

Plaintiff contends that he must be found disabled unless his skills are readily transferable to other sedentary skilled work within his residual functional capacity. Defendant does not contest that; it argues that, based on the VE's testimony, the ALJ correctly concluded that Plaintiff could perform other skilled sedentary work.

The ALJ, in his Decision dated March 26, 1996, states that "[i]n response to [my] hypothetical . . . the vocational expert replied that [Plaintiff] would [have] skills transferable

[3] The other requirements of both Rule 201.06 and Rule 201.07 are met. Plaintiff is older that 55 years of age (R. 39, 70, 160, 83-86); he has earned Master of Arts Degrees in Mathematics and Computer Science(R. 39, 111); and the Commissioner's findings were that Plaintiff was capable of sedentary work.

to jobs at the sedentary work level not in the same industry, and that such jobs existed in significant numbers in the national economy." The ALJ found that though "[t]he claimant is unable to perform his past relevant work as a college teacher," he does have "the residual functional capacity including transferable work skills to perform sedentary jobs not in the same industry." (R. 265-66). The hypothetical and the statement of the vocational expert ("VE") referred to were made during a hearing held on August 20, 1991. (R. 65). At that time, the VE also testified that Plaintiff's previous "skilled" experience would enable him to perform available jobs in computer programming and systems analysis, both jobs which the VE classified as "skilled," and data entry jobs, which the VE classified as "very low level semi-skilled." (R. 65). Had this been the only testimony of the VE, the ALJ's determination that Plaintiff had transferable skills would have been correct. There was, however, additional testimony offered by the VE on July 27, 1995. During that hearing, the VE heard additional information regarding Plaintiff's skills and experience -- specifically, that although Plaintiff had taught computer sciences at the introductory level, his practical knowledge of programming was very limited.[4] Based

[4] Plaintiff testified that as a professor he taught "[m]ath and -- well at different times, math and/or computers. My original background is mathematics. I guess I got interested in computers because I am really interested in logic . . . . [I taught] introductory first year computer science . . . . I can write a very elementary program . . . [b]ut I do not have the skills that, say would allow me to write [the kind of program

(continued...)

on this additional information, the VE testified that at that skill level, "that's not going to get [Plaintiff] a job as a programmer," and specifically discussed as possible employment only "something like [a] data entry clerk," described as "very low level semi-skilled" work. (R. 65, 328-30).

While this Court is bound by the factual findings of the Commissioner if they are supported by substantial evidence and decided according to correct legal standards (see Allen v. Brown, 881 F.2d 37, 39 (3d Cir. 1989); Coria v. Heckler, 750 F.2d at 247, this Court retains the responsibility to scrutinize the entire record and to reverse or remand if the Commissioner's decision is not supported by substantial evidence. Smith v. Califano, 637 F.2d 968, 970 (3d Cir. 1981). Substantial evidence can only be considered as supporting evidence in relationship to all other evidence in the record. Kent v. Schweiker, 701 F.2d 110, 114 (3d Cir. 1983). Because the ALJ offered no reason why he did not consider the testimony given by the VE on July 15, 1995, this Court may reach the conclusion that the ALJ failed to consider it. Baerga v. Richardson, 500 F.2d 309, 312 (3d Cir. 1974). Because the ALJ, in fact, makes no reference to that testimony, and appears to base his opinion on the earlier testimony of the VE, which is inconsistent with the VE's more

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[4](...continued)
required for] a beginning position. And so, so I would say, my skills are minimal . . . in that respect. I can teach somebody how to program, because I know . . . how to teach logic." (R. 309-10).

recent testimony, it appears that the ALJ did not consider this later testimony. Therefore, because substantial evidence must be considered in relationship to all other evidence on the record, this Court will remand this case on the issue of whether Plaintiff has transferable work skills.

An appropriate Order follows.

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O R D E R

AND NOW, this day of March, 1999, upon consideration of the parties' cross-motions for summary judgement (Doc. Nos. 14 & 15), review of the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi (Doc. No. 18), and the parties' Objections, Replies and Responses (Doc. Nos. 19, 20 & 21) , and the Record of the Proceedings, it is **HEREBY ORDERED** that:

1. The Plaintiff's motion for summary judgement is **DENIED**.

2. The Defendant's motion for summary judgement is **DENIED**.

4. The Commissioner's decision denying Plaintiff Disability Insurance Benefits under Title II of the Social Security Act, 42 U.S.C.A. §§ 401-433 is **REMANDED** for further consideration consistent with the Memorandum accompanying this Order.

BY THE COURT:

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JOHN R. PADOVA, J.